Supreme Court, U.S.
FILED
MAY 21 1990
JOSEPH F. SPANIOL, JR.
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No. 89-1750

In The

Supreme Court of the United States

October Term, 1989

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA,

Petitioners,

v.

THE OHIO STATE UNIVERSITY, et al.,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

FRANCISCO A. GARABIS
Counsel for Petitioner, Local 4501, Communications Workers of America
765 South High Street
Columbus, Ohio 43206
(614) 443-0305

(C) 302

SUPPLEMENTAL APPENDIX

Enclosed herein for the Court's consideration are the unreported opinions of the lower courts in this matter, to wit:

A. Court of Appeals for Franklin County, Ohio, Case No. 87AP-902,

B. Common Pleas Court for Franklin County, Ohio, Case No. 87CV-01-623.

Both matters were captioned: *Local 4501, Communications Workers of America v. The Ohio State University, et al.*

Respectfully submitted

FRANCISCO A. GARABIS
Counsel for Petitioner,
Local 4501, Communications Workers of America
765 South High Street
Columbus, Ohio 43206
(614) 443-0305

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Local 4501, Communications Workers of America,	:	
Plaintiff-Appellant,	:	
v.	:	No. 87AP-902
The Ohio State University et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

OPINION

Rendered on August 11, 1988

MR. FRANCISCO A. GARABIS, for appellant.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General; MOOTS, COPE & WEINBERGER CO., L.P.A., MS. ELIZABETH M. STANTON and MS. WANDA L. CARTER, for appellees.

APPEAL from the Franklin County Common Pleas Court.

WHITESIDE, P.J.

Plaintiff, Local 4501, Communications Workers of America, appeals from a decision of the Franklin County Court of Common Pleas and raises the following assignment of error:

> "The Court of Common Pleas committed reversible error by dismissing the action by finding that civil service employees are not entitled to preserve the testimony given at a pre-termination hearing."

Plaintiff represents a substantial number of employees who are classified as civil servants within the meaning of R.C. Chapter 124 and employed by defendants, Ohio State University et al., (OSU) and, as such, is responsible, pursuant to a collective bargaining agreement, to represent such employees in disciplinary hearings conducted by defendants.

Plaintiff and defendants entered into labor agreements which contain a provision requiring a "show cause" hearing conducted by defendants before an employee may be suspended, removed or demoted. Ordinarily, no record is made of the testimony of this hearing. Plaintiff-union requested that the defendants allow it to bring in either a court stenographer or a tape recorder so that the testimony can be preserved. The defendants refused to allow a record of the hearing. Plaintiff filed a complaint in the Franklin County Court of Common Pleas seeking a declaratory judgment as to whether a record of the pre-disciplinary proceedings is a constitutional right to which plaintiff's members are entitled.

The trial court, upon defendants' motion to dismiss which was converted to a motion for summary judgment, found that plaintiff has no constitutional right to record a pre-termination hearing, that any rights of plaintiff must rest on grounds other than due process and, that as a matter law, plaintiff's action must be dismissed.

Plaintiff contends that it was improper for the trial court to grant summary judgment based on the complaint, affidavits and attachments to a motion to dismiss contending that a civil service employee has a right to a pre-termination hearing under the Due Process Clause of

the Fourteenth Amendment to the United States Constitution and has a right to have facts presented at the pretermination hearing and has a right to have the record preserved.

Defendants filed a motion to dismiss pursuant to Civ. R. 12(B)(6), which states that " * * * [w]hen a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. * * * All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." The staff notes to Civ. R. 12(B) state that "[w]hile provisions under consideration were thought to provide desirable flexibility, the procedure is optional with the court, and presumably in most situations a court should exclude matter outside the pleading, thereby making it necessary for defendant to move formally for summary judgment under Rule 56 in order to present matters outside the pleadings." While, as the staff notes reflect, Civ. R. 12(B)(6) motions are not automatically to be treated as a motion for summary judgment, Civ. R. 12(B) is designed to provide flexibility at the option of the court.

In this case, the trial court requested the parties to file affidavits. Previous to that, the trial court had on file defendants' motion to dismiss with supporting materials and plaintiff's response to defendants' motion to dismiss with supporting materials. There were no facts in dispute at any time, and the only issue before the court was whether, by law, the plaintiff was entitled to a declaratory judgment requiring that a record be made of the

pre-termination hearings. The trial court found no law which would afford plaintiff a constitutional right under the Due Process Clause to record a pre-termination hearing. Summary judgment can be found where, under Civ. R. 56, there is no genuine issue as to any material fact and the moving party, in this case the defendants, is entitled to judgment as a matter of law. This may be found only when reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made construing the evidence most strongly in its favor.

In this case, the trial court correctly decided to convert a motion to dismiss to a motion for summary judgment after requesting affidavits from each party, and based thereon found that no facts were at issue and that the decision was one which could be decided entirely by law. The trial court determined that the plaintiff, by law, had no constitutional right under the Due Process Clause to the preservation of testimony by means of a record at a pre-termination hearing.

The plaintiff contends that *Cleveland Bd. of Education v. Loudermill* (1985), 470 U.S. 532 requires a pre-termination hearing and then contends that *Loudermill, supra,* requires a preservation of testimony at the pre-termination hearing to avoid false testimony, mistaken decisions and arbitrary actions of the employer. The United States Supreme Court in *Loudermill, supra,* found that Chapter 124 creates for the employee a property interest in continued employment when such employee holds a classified position for good behavior which allows dismissal for only limited reasons. Moreover, the Due Process Clause

of the United States Constitution, because the employment is a property right, requires notice and the opportunity for a hearing, appropriate to the nature of the case, before any one may be deprived of that employment property right. The hearing must occur before the deprivation of employment and must provide the employee with some opportunity to respond.

In *Loudermill, supra,* the Supreme Court balanced the interests of the employer, (namely, the expeditious removal of unsatisfactory employees, the avoidance of administrative burdens and the risk of erroneous termination) against the interests of the employee, (namely, the retention of employment and a strong interest in avoiding disruption in employment by erroneous decisions.) The Supreme Court, in footnote 8 at page 543 of *Loudermill,* stated that at least the employer will be alerted to the existence of disputed facts, its decision will be informed and the risk of error will be substantially reduced. In other words, due process requires that the employer take time to be informed about plausible arguments which may indicate that the discharge is misfounded so that error may be avoided.

The Supreme Court found that a hearing need not necessarily be elaborate and may be something less than a full evidentiary hearing. At page 545 the Court stated " * * * the pre-termination hearing need not definitively resolve the propriety of the discharge. It should be an *initial* check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. * * * " (Emphasis added.) Further, the Court said at page 546, " * * * [t]he

opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. * * * "

Although Justices Brennan and Marshall argued for greater pre-termination procedures when "facts are in dispute," a majority of the court found that oral or written notice, an explanation of the employer's evidence and an opportunity for the employee to present his side of the story was sufficient and to require more would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. A pre-termination hearing acts as an initial check against mistaken decisions of the employer. Neither *Loudermill, supra,* nor recent case law requires a record to be made of a pre-termination hearing and we do not find plaintiff to be entitled to such a hearing by the Due Process Clause of the United States Constitution. The government's interest in the efficient dismissal of an employee for misfeasance, malfeasance or nonfeasance in office under R.C. 124.11 is not outweighed by the highly speculative possibility of the employer's fabrications and avoidance of arbitrary decisions which a record will not necessarily eradicate and for which post-termination procedures are available, specifically, in this instance, binding arbitration, at which all evidence may be examined *de novo*.

Plaintiff also contends that it has a statutory right to record pre-termination hearings pursuant to Chapter 119 of the Revised Code, the Administrative Procedure Act, which requires a record of adjudicatory hearings. An adjudication under R.C. 119.01(D) is " * * * the determination by the highest or ultimate authority of an agency of

the rights, duties, privileges, benefits, or legal relationships of a specified person, * * * ."

The pre-termination hearing at issue here is provided for by contract by agreement of the parties and is required by *Loudermill, supra,* but is not a determination by the highest or ultimate authority of an agency. The agreement entered into by the parties to this action provides that an aggrieved employee take his or her grievance to final and binding arbitration where recording of the arbitration hearings presumably is allowed rather than to the State Personnel Board of Review. See R.C. 4117.10(A). Further relief, if available, must be sought in the common pleas court rather than to the State Personnel Board of Review under R.C. Chapter 119. See R.C. 4117.09(B). By agreement, it is the arbitrator who serves as the decision-maker or higher authority. Accordingly, there is no compelling necessity for preserving the evidence received at the pre-termination hearing since a full *de novo* hearing is afforded either by binding arbitration pursuant to a collective bargaining agreement or by appeal to the State Personnel Board of Review whichever may be applicable. The assignment of error is not well-taken.

For the foregoing reasons, plaintiff's assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN and YOUNG, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Local 4501, Communications Workers of America,	:	87CV-01-623
Plaintiff-Appellant,	:	No. 87AP-902 (REGULAR CALENDAR)
v.	:	
The Ohio State University et al.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on August 11, 1988, the assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE, P. J.,
BOWMAN & YOUNG, JJ.
By /s/ Alba L. Whiteside
Judge Alba L. Whiteside, P. J.

cc: Francisco A. Garabis
Anthony J. Celebrezze, Jr.
Elizabeth M. Stanton and
Wanda L. Carter

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO CIVIL DIVISION

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA,

PLAINTIFF,

CASE NO. 87CV-01-623

VS.

THE OHIO STATE UNIVERSITY, et al.,

DEFENDANTS.

DECISION

Rendered this 19th day of August, 1987.

CRAWFORD, J.

The Court has for consideration defendants' motion to dismiss which has been converted to a motion for summary judgment. The primary issue raised by plaintiff in its request for declaratory judgment is whether a stenographic or tape recording of pre-disciplinary proceedings is a right to which plaintiff's members are entitled.

The Court is aware of the position of defendants, which is that they do not agree that recordings of such hearings should be made. The merit of a recording or the absence of such is not the dispositive issue. Plaintiff claims a constitutional right to such evidentiary preservation. Plaintiff cites *Cleveland Bd of Edn v. Loudermill* (1985), ___ U.S. ___, 84 L. Ed. 2d 494. (sic) as the basis for a right to a pre-termination hearing. The Court agrees that said case stands for such proposition. The holding was based upon the finding that a termination of one's employment without a prior hearing was a violation of due process. *Loudermill*, supra, held that an employee should be able to

respond to charges prior to termination by appearing in person or by writing a response. The case stands for the proposition that an employee must be given an opportunity to present his side of the story before termination. The Supreme Court did not find that a full adversary or evidentiary hearing was necessary. This Court is unaware and has not been cited to any case supporting plaintiff's claim of a constitutional right to recording. Nor is the Court aware of any cases supporting the theory that a failure to provide such recording is a denial of due process.

Defendants assert that the primary grounds for dismissal is the lack of any constitutional right to the demands of a recording made by plaintiff. Defendants further assert that plaintiff has waived any right to such recording by virtue of the dispute resolution procedure followed under their contract. The contract provides certain steps in a grievance procedure as well as the right to binding arbitration. Defendants assert that if this action is proper then the action should be referred to arbitration. Defendants further contend that if the action has merit then the jurisdiction of the State Employee Relations Board should be invoked. Defendants' position is that the action is, in reality, an allegation of an unfair labor practice and as such, should be brought pursuant to R.C. § 4117 et seq.

The Court has determined that no constitutional right to recording a pre-termination hearing exists. Plaintiff's right to such must rest on grounds other than due process. The provisions for grievance and arbitration or the provisions under R.C. § 4117 must provide the avenue for plaintiff to pursue its legal recourse.

The Court must find that if plaintiff has a contractual right then arbitration as provided for by the labor contract or a charge of unfair labor practice with the State Employee Relations Board is the appropriate vehicle for resolution of the dispute. Upon consideration of the uncontroverted factual issues, the Court must conclude as a matter of law, that plaintiff's action must be dismissed.

Counsel for appellee shall prepare a judgment entry accordingly by September 1, 1987.

/s/ Dale A. Crawford
DALE A. CRAWFORD, JUDGE

COPIES TO:

Francisco A. Garabis, Esq.
for Plaintiff

Elizabeth M. Stanton, Esq.
for Defendants

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO CIVIL DIVISION

LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA	:	TERMINATED
	:	Case No. 87CV-01-623
Plaintiffs,	:	Judge Crawford
v.	:	
THE OHIO STATE UNIVERSITY, et al.,	:	
Defendants.		

JUDGMENT ENTRY

This matter came on for consideration before this Court upon Defendants' Motion to Dismiss which was converted to a Motion for Summary Judgment and for the reasons stated in the decision of this Court rendered on August 19, 1987, it is

ORDERED, ADJUDGED, and DECREED that the action be dismissed with prejudice and that Defendants recover their costs.

Date: 9-3-87

/s/ Crawford
Judge Crawford

APPROVED:

/s/ Elizabeth M. Stanton
By: Elizabeth M. Stanton (STA30)
Special Counsel
Moots, Cope & Kizer Co., LPA
3600 Olentangy River Road
Columbus, Ohio 43214-3441
(614) 459-4140

Attorney for all Defendants

Francisco A. Garabis (GAR15)
765 South High Street
Columbus, Ohio 43206

Attorney for Local 4501
Communications Workers of America